

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO**

DARREN HERRERA and PAULA
GARCIA,

Plaintiffs,

v.

CIV 20-538 KWR/SCY

CITY OF ESPANOLA, a municipality, JANE
ROES 1-3, JOHN DOES 1-2, DANIELLE
BUSTOS, and XAVIER MARTINEZ in their
individual capacities,

Defendants.


PROPOSED FINDINGS AND RECOMMENDED DISPOSITION

THIS MATTER comes before the Court *sua sponte*. After discussion by the parties and the Court at the July 19, 2022 Scheduling Conference, on August 1, 2022 the Court granted Plaintiffs an extension of time through October 31, 2022 to identify and serve the fictitious defendants (Jane Roes 1-3 and John Does 1-2). Doc. 40. On unopposed motion, the Court again extended the deadline through December 1, 2022. Doc. 51. That deadline passed without service on the fictitious defendants and without another request for extension of time.

Rule 41(b) permits a court to dismiss an action or any claim for failing to prosecute that action or claim. *See* Fed. R. Civ. P. 41(b); *Olsen v. Mapes*, 333 F.3d 1199, 1204 n.3 (10th Cir. 2003) (“Although the language of Rule 41(b) requires that the defendant file a motion to dismiss, the Rule has long been interpreted to permit courts to dismiss actions *sua sponte* for a plaintiff’s failure to prosecute or comply with the rules of civil procedure or court’s orders.”). “Employing Rule 41(b) to dismiss a [claim] without prejudice . . . allows the plaintiff another go at [compliance]; accordingly, a district court may, without abusing its discretion, enter such an order without attention to any particular procedures,” such as an evaluation of the *Ehrenhaus*

factors. *Nasious v. Two Unknown B.I.C.E. Agents, at Arapahoe Cty. Just. Ctr.*, 492 F.3d 1158, 1162 (10th Cir. 2007).

Given that Plaintiffs have not identified and served the fictitious defendants and the deadline has passed to do so, I recommend that the Court dismiss these defendants without prejudice.


STEVEN C. YARBROUGH
UNITED STATES MAGISTRATE JUDGE

THE PARTIES ARE FURTHER NOTIFIED THAT WITHIN 14 DAYS OF SERVICE of a copy of these Proposed Findings and Recommended Disposition they may file written objections with the Clerk of the District Court pursuant to 28 U.S.C. § 636(b)(1). **A party must file any objections with the Clerk of the District Court within the fourteen-day period if that party wants to have appellate review of the proposed findings and recommended disposition. If no objections are filed, no appellate review will be allowed.**